Petition

Supreme Court, U.S.
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No. ..-....
IN THE

Supreme Court of the United States

HERITAGE PUBLISHING COMPANY, a California corporation,
Petitioner,

vs.

JOSEPH J. CUMMINS, B'NAI B'RITH MESSENGER, a California corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA.

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Questions Presented for Review.

WHETHER IT WAS IMPROPER FOR THE COURT OF APPEAL TO CONCLUDE RESPONDENTS HAD CONDUCTED A REASONABLE INVESTIGATION WHEN THE RECORD REFLECTED A SUFFICIENT BASIS FOR THE JURY TO CONCLUDE THAT THEY DID NOT AND THAT THEY ENTERTAINED SERIOUS DOUBTS AS TO THE TRUTH OF THEIR CLAIM?

WHETHER THE COURT OF APPEAL BY ITS DECISION HAS IN EFFECT IMMUNIZED FROM LIABILITY ANY DEFAMATION WHERE THE DEFENDANT TESTIFIES THAT HE MADE SOME INVESTIGATION OF THE LIBELOUS MATERIAL BEFORE PUBLISHING?

WHETHER THIS COURT SHOULD FURTHER DEFINE THE SCOPE OF APPELLATE REVIEW USED IN DETERMINING IF CONSTITUTIONAL ACTUAL MALICE HAS BEEN PROVED BY CLEAR AND CONVINCING EVIDENCE?

WHETHER THE STANDARD OF PROOF (CLEAR AND CONVINCING EVIDENCE) TO ESTABLISH CONSTITUTIONAL ACTUAL MALICE APPLIES AT THE APPELLATE LEVEL AS WELL AS AT THE TRIAL LEVEL?

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA.

To the Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeal, Second Appellate District, State of California, filed in the above-entitled case on October 6, 1981, as modified on November 4, 1981, which reversed a jury verdict for libel on the ground petitioner failed to establish constitutional actual malice with the convincing clarity required by *New York Times v. Sullivan*, 376 U.S. 254 (1964), and progeny.

OPINION BELOW.

The opinion of the Court of Appeal is reported in 124 Cal.App.3d, page 305. A copy of the court's opinion appears in Appendix "A" hereto. The subsequent modification of the opinion appears in Appendix "B" hereto.

JURISDICTION.

The judgment of the Court of Appeal was filed on October 6, 1981. Petition for rehearing was timely filed and was denied on November 4, 1981. At that time, the original opinion was modified by adding a new footnote 5. Petition for hearing before the California Supreme Court was timely filed and was denied on December 30, 1981. A copy of the Order denying this hearing appears in Appendix "C". This Court has jurisdiction pursuant to Title 28, U.S.C. §1254(1).

APPLICABLE CONSTITUTIONAL PROVISIONS.

First Amendment, United States Constitution:

> "Congress shall make no law . . . abridging the freedom of speech or of the press . . ."

Fourteenth Amendment, United States Constitution:

> ". . .No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE.

This is a libel action between two weekly newspapers, both headquartered in Los Angeles, California. HERITAGE PUBLISHING COMPANY (hereafter "HERITAGE"), plaintiff at trial, petitioner herein, began publication in 1954 under the name *Heritage* but changed its name in 1958 to *Heritage-Southwest Jewish Press* after it purchased a San Diego, California-based newspaper called *Southwestern Jewish Press*. This latter newspaper, according to petitioner's proof at trial, was the outgrowth by mergers, consolidations and name changes of antecedent publications dating back to 1914. After the acquisition, *Heritage-Southwest Jewish Press* claimed in each edition that it had been

"published since 1914". JOSEPH J. CUMMINS, a defendant and respondent herein, was the editor and publisher of the *B'nai B'rith Messenger* (hereinafter "THE MESSENGER"), the other trial defendant and also a respondent herein. MR. CUMMINS also was an attorney and practiced law in Los Angeles for over forty (40) years. *The Messenger* began publication in 1897 according to its own masthead. It was established at trial that *The Messenger* was not related in any way to the national Jewish organization known as "B'NAI B'RITH".

The *Heritage* claim that it had been published since 1914 is summarized by trial Exhibit 17. A reduced copy of this Exhibit is attached hereto as Appendix "D" and is incorporated herein by reference.

THE COMPLAINT.

The complaint alleges that on July 19, 1974 *The Messenger* attacked petitioner's claim that it had been published since 1914. The attack was in the form of a lengthy article under the by-line of respondent CUMMINS and headlined "Will Kramer Attempts to Justify Heritage Claim — 'Published Since 1914' ". Other headlines appearing in the article were "The Kramer Balderdash Can't Evade the Facts That the '1914' Claim is False", and "There was no Southwestern Jewish Review Ever Published in San Diego". This article, which precipitated the instant action, is reproduced in its entirety in Appendix "E".

In addition to the headlines quoted above, the July 19, 1974 *Messenger* article characterized petitioner's 1914 claim as "false", "phony", "a fraud", "a damnable lie", "a fictitious line", and accused *Heritage* of "carrying on a program of mendacity". The article concluded by stating that the two (2) claims made by *Heritage*, "Published Since 1914" and "Our 60th Year", were "two damnable lies".

This article, which expressly impugned the morals, ethics, honesty and veracity of *Heritage* by the foregoing language, also directly accused *Heritage* and HERB BRIN, its editor and publisher, of *dishonesty*.

DR. KRAMER'S ARTICLE.

The 1974 attack (the last of a series of attacks which began in 1954 when *Heritage* began publication) was prompted by an article written by DR. WILL KRAMER, a noted Jewish historian. This article, entitled "How Old is Heritage", encompassed but twenty-five (25) lines and provided a summary of the basis for the *Heritage* claim of a 1914 beginning. Appearing in the June 28, 1974 edition of *Heritage* and later reprinted in the July 19, 1974 attack on petitioner, KRAMER'S piece reads as follows:

"How Old is Heritage

So how old is Heritage?

Newspapers are judged by the date of their founding or the date of papers with which they have merged, whichever is older.

When Heritage acquired the Southwest Jewish Press, it also acquired that newspaper's origin, by usual usage.

The Southwest Jewish Press had as part of its history the San Diego based Southwestern Jewish Review which served the California Southland.

So, again, how old is Heritage? According to the article on 'Periodicals and Press' in the ten volume Universal Jewish Encyclopedia, the Southwestern Jewish Review, a weekly, was founded in 1914.

Now, how old is Heritage?

It is what it says it is, by merger and acquisition and via several name changes, sixty years old. *K'ninahora*.

Heritage-Southwest Jewish Press, a merged and combined publication with various zoned editions, has been published since 1914.

You want to know where to find the reference in the encyclopedia: Volume 8, page 452. That's where!

— Dr. Will Kramer''

SUMMARY OF EVIDENCE AT TRIAL CONCERNING CONSTITUTIONAL ACTUAL MALICE.

Trial Contentions.

Heritage's position at trial was that the attacks were made in bad faith and with malice, both constitutional and traditional and with the motive to destroy *Heritage* as a competitor and not to ''inform'' the Jewish public. *Heritage* further contended that any investigation into the truth of the claim of a 1914 origin which was undertaken, if any, was grossly inadequate under the circumstances, that it was not ''hot news'', and that MR. CUMMINS' purported investigation was a sham, a carefully contrived attack to make it appear he had investigated when he did little, if any, investigating and then he misled his readers as to what he did do. The basic thrust of respondents' position was that the attacks on the *Heritage* claim were made in a good faith belief in the truth of the statements made, based on a purported investigation made by them. Respondents' credibility was very much in issue at the trial, as explained below.

Failure to Corroborate Through Obvious Available Sources.

Petitioner's evidence at trial established that respondent CUMMINS failed to corroborate his story through two obvious available sources, DR. KRAMER and HERB BRIN. DR. KRAMER was personally known to MR. CUMMINS and had spoken to him over the years on other matters. MR. CUMMINS did not communicate with DR. KRAMER con-

cerning the investigation the latter had made in preparing his story. DR. KRAMER testified in essence that the 1914 origin of *Heritage* began with the publication of the temple bulletin at the Temple Beth Israel in San Diego, California. This bulletin was later expanded and enlarged into the *Jewish Community News*. Other newspapers became part of the *Heritage* continuum of antecedent publications, as summarized by Appendix "E". Nor did MR. CUMMINS communicate with MR. BRIN concerning information in his possession as to the 1914 claim. MR. BRIN had numerous copies of old newspapers forming a substantial part of the chain of origin back to 1914, many of which were introduced in evidence. One such newspaper was the *Southwestern Jewish Review*, which respondents claimed in their article did not exist. MR. CUMMINS further failed to communicate with the *Universal Jewish Encyclopedia*, referred to in DR. KRAMER'S article.

Respondents' Efforts to Confuse and Mislead Their Readers Concern'ng the *Heritage* Claim.

MR. CUMMINS contrived the erroneous argument that there was no such paper as the *Southwestern Jewish Review*. In this regard, he referred to his 1963 attack on *Heritage* in column one of the 1974 *Messenger* article and purported to quote from a letter, allegedly written by RABBI ERNEST TRATTNER, who was the Rabbi and editor of the temple bulletin at Temple Beth Israel in San Diego in 1920-21, to the effect that, "there was no Southwestern Jewish Review, nor did I ever hear of such a paper." However, evidence in the case proved that the *Southwestern Jewish Review* was not established until 1923 (see Appendix "E"); therefore, the jury could have concluded that RABBI TRATTNER would not have known of the *Southwestern Jewish Review* in 1920-21 because it did not then exist and that MR. CUM-

MINS intentionally tried to mislead his readers on this issue. Moreover, RABBI TRATTNER'S letter was never produced at trial.

MR. CUMMINS continued by quoting from RABBI MAXWELL DUBIN, who succeeded RABBI TRATTNER as Rabbi at Temple Beth Israel in San Diego. RABBI DUBIN continued the publication of the temple bulletin and expanded and renamed it *The Jewish Community News*. According to MR. CUMMINS, RABBI DUBIN, who was the Rabbi at Temple Beth Israel from 1921 to 1925, stated that "there was no newspaper published in the community known as the 'SOUTHWEST JEWISH PRESS' ", the latter, of course, being a different newspaper than the *Southwestern Jewish Review*, which is the newspaper of which MR. CUMMINS claimed RABBI TRATTNER had not heard. Thus, the jury could have inferred that MR. CUMMINS cleverly and intentionally changed the names of the newspapers in the context of the purported quotes from RABBIS TRATTNER and DUBIN to try to confuse his readers. He further attempted to compound this confusion by claiming that RABBI MORTON COHN, who came to Temple Beth Israel in 1946, said that LEWIS SOLOMON had founded the *Southwest Jewish Press* "a few years before." MR. CUMMINS thus tried to confuse his readers into believing that the *Southwestern Jewish Review* and the *Southwest Jewish Press* were one and the same newspapers and had only been published beginning a few years before 1946.

Further, the headline appearing on the right side of the July 19, 1974 MESSENGER article announced in boldfaced type:

> "THERE WAS NO SOUTHWESTERN JEWISH REVIEW EVER PUBLISHED IN SAN DIEGO".

This headline was false because many copies of the *Southwestern Jewish Review* were introduced in evidence. As noted above, MR. CUMMINS made no effort to communicate with MR. BRIN or MR. KRAMER concerning the 1914 claim. The jury could have believed that MR. CUMMINS should have inquired as to whether MR. BRIN had any copies of the *Southwestern Jewish Review* available for his (CUMMINS') examination. These copies besides establishing the fact of the existence of the *Southwestern Jewish Review*, also established that the newspaper began, in one form or another, in 1914. Not only did MR. CUMMINS make the claim in his article that there was no *Southwestern Jewish Review* ever published in San Diego, but he stated in his deposition that he had been "unable to reach anybody who ever heard that it ever existed." The jury could have found that this was an obvious deception by MR. CUMMINS because, as noted above, he never inquired of either MR. BRIN or DR. KRAMER concerning their knowledge of the existence of the *Southwestern Jewish Review*. This failure was particularly grievous so far as DR. KRAMER was concerned, not only because he was a historian (a fact noted by MR. CUMMINS several times in his article), but because DR. KRAMER even specifically referred to the *Southwestern Jewish Review* as having been founded in 1914 in the article he wrote for *Heritage*.

Notice of Basis for Petitioner's Claim of a 1914 Origin and Respondent's Duty to Inquire.

MR. CUMMINS clearly had ample notice from DR. KRAMER'S article as to the basis of the *Heritage* claim, *i.e.*, that it was sixty (60) years old by virtue of mergers and name changes.

Part of DR. KRAMER'S article was quoted in black type by MR. CUMMINS, who referred to it as a "monumental

hunk of hogwash" and "historical unadulterated bunkum". Not only did MR. CUMMINS fail to inquire of MR. BRIN or DR. KRAMER as to what evidence they had concerning the 1914 claim, but the jury could have concluded that he had serious doubts about the veracity of his claim when he posed the following question:

> ". . . is the dear rabbi [KRAMER] relying upon a ridiculous self-made inference that since the Southwest Jewish Press is published in San Diego NOW, that the former Jewish papers published in San Diego belong to the presently published paper?" (Capitals in original).

That is, of course, the thrust of DR. KRAMER'S article. His article was sufficiently clear to have put MR. CUMMINS on a duty to inquire as to the basis for the claim. The fact that MR. CUMMINS failed to do it could have been interpreted by the jury as reckless disregard for the truth. Further evidence of serious doubts on the part of MR. CUMMINS and of his reckless disregard for the truth could have been inferred by the jury from the following self-serving language in the third from the last paragraph of his article:

> "But, however, assuming that some individual came out with an issue of a Southwestern Jewish Review in San Diego, it could have no relation whatsoever to the Southwest Jewish Press OR *Heritage*. NONE WHATSOEVER!" (Capitals in original).

When questioned during his deposition concerning DR. KRAMER'S claim that *Heritage* was sixty (60) years old based on "merger and acquisition", MR. CUMMINS testified that he did not feel it was necessary to do any investigating as concerns mergers and acquisitions because he knew in his own mind that there were no mergers, acquisitions or name changes.

RESPONDENTS' CREDIBILITY.

Respondents claimed at trial that they investigated the *Heritage* claim in various particulars. According to MR. CUMMINS, he went down to San Diego and tried to find someone, allegedly without success, who had heard of the *Southwestern Jewish Review*. However, any purported investigation claimed to have been done by MR. CUMMINS concerning the 1914 claim was done before he wrote the 1963 article because he admitted doing no investigating in connection with the 1974 article.

Respondents further relied at trial on the investigation conducted by GILBERT THOMPSON, associate editor and co-publisher of the MESSENGER, concerning the 1974 article. However, MR. THOMPSON'S testimonial assertions as to the investigation conducted by him in addition to the research done by MR. CUMMINS for the 1963 article could have been considered by the jury as not believable because of the denial by MR. CUMMINS three times in his deposition that any new research or investigation was done by him or by anyone on his behalf in regard to the 1974 article.

Further, not only was the jury entitled to disbelieve both the testimony of MR. CUMMINS and MR. THOMPSON concerning any purported investigation done by either of them concerning the 1974 article, but MR. CUMMINS' credibility was also very much in issue as concerns the 1963 article because he was unable to produce for trial any records, documents or letters concerning the 1963 investigation.

MR. CUMMINS also claimed both in his deposition testimony, as well as in the 1974 article, that the City Directory of San Diego contained no Jewish newspaper listing before 1941. Yet, petitioner introduced evidence at trial showing

that the 1931 City Directory for the City of San Diego listed the *Jewish Community News* as a weekly newspaper. The *Jewish Community News* is the same newspaper which RABBI DUBIN enlarged and expanded from the Temple Bulletin. While MR. CUMMINS purported to quote from RABBI DUBIN in the 1974 article to the effect that while RABBI DUBIN was in San Diego there was no newspaper published in the community known as the *Southwest Jewish Press*, the jury could have inferred that MR. CUMMINS deliberately chose not to ask RABBI DUBIN about the *Jewish Community News*. The jury could have also inferred that while MR. CUMMINS knew of the existence of the *Jewish Community News* through his friendship and communications with RABBI DUBIN, he again intentionally misled his readers by claiming that the City Directory of San Diego contained no Jewish newspaper listing before 1941. The jury could further have believed that there was collusion between RABBI DUBIN and MR. CUMMINS as concerns the *Heritage* claim because of extensive donations made by MR. CUMMINS to RABBI DUBIN'S temple after the RABBI moved from San Diego to Los Angeles, California.

Additional evidence relating to MR. CUMMINS' credibility concerned the significant difference between the circulation claimed by the *Messenger* during discovery and testimony at trial. Interrogatories read to the jury established that for the year 1974 *Messenger* subscribers totalled 62,078. Yet, according to petitioner's evidence, the total *Messenger* mailing labels in November and December 1974 was between 14,500 and 15,000. Thus, the jury was justified in inferring from this evidence that MR. CUMMINS was overstating the number of subscribers to the *Messenger* for purposes of this lawsuit and justifiably could have disbelieved him on other issues in the case.

THE DECISIONS BELOW.

Following a jury trial in the Superior Court of the State of California, County of Los Angeles, before the Honorable Jack T. Ryburn, Judge, Presiding, on July 10, 1979, the jury returned a verdict in favor of petitioner in the sum of One Hundred Thousand Dollars ($100,000.00), Forty Thousand Dollars ($40,000.00) for general damages and Sixty Thousand Dollars ($60,000.00) for punitive damages. Respondents filed a motion for judgment notwithstanding the verdict and for a new trial. Following a hearing on September 5, 1979, the Court denied the motion for judgment notwithstanding the verdict, but granted the motion for new trial on the ground of excessive damages subject to the condition that a new trial was denied if within fifteen (15) days from the date of the Court's ruling (September 7, 1979) petitioner would consent to a reduction of Fifteen Thousand Dollars ($15,000.00) in general damages and Ten Thousand Dollars ($10,000.00) in punitive damages, resulting in a judgment of Twenty-Five Thousand Dollars ($25,000.00) general damages and Fifty Thousand Dollars ($50,000.00) punitive damages.

Thereafter, on September 19, 1979, petitioner filed its consent to modification of judgment pursuant to the Court's ruling of September 7, 1979.

On October 6, 1981, the Court of Appeal filed its opinion reversing the verdict and judgment in favor of plaintiff on the ground that petitioner failed to prove constitutional actual malice by clear and convincing evidence, but noting that traditional malice was overwhelmingly proved. A Petition for Rehearing was filed on October 20, 1981 and was denied on November 4, 1981, except for the modification to add a new footnote 5. Hearing before the California Supreme Court was denied on December 30, 1981. (Appendix "C").

REASONS FOR GRANTING THE WRIT.

I.

THE CRITICAL ISSUE OF RESPONDENTS' CREDIBILITY CANNOT BE SEPARATED FROM THE QUESTION OF THEIR SUBJECTIVE AWARENESS OF THE PROBABLE FALSITY OF THEIR 1974 PUBLICATION AND WAS A QUESTION OF FACT FOR THE JURY.

A. The Jury Had the Right to Draw the Inference From the Evidence That Respondents Either Failed to Conduct Any Investigation or That They Deliberately Conducted a Grossly Inadequate Investigation and Then Misled Their Readers as to What They Did.

The linchpin of the decision of the Court of Appeal is that petitioner failed to prove by clear and convincing evidence that respondents wrote the 1974 article either knowing that its basic accusation was untrue or with reckless disregard of whether it was true or false or with serious doubts concerning its truth. In so holding, the Court of Appeal *surmised* that the 9 to 3 jury verdict was the result of the "overwhelming proof of actual malice in the traditional sense." In this regard, footnote 2 to the Court's opinion states as follows:

> "We *surmise* that the 9 to 3 jury verdict here for Heritage was *probably* due in large part to the overwhelming proof of actual malice in the traditional sense on the part of defendant Cummins toward Heritage that Heritage offered . . . ." (Emphasis added).

Petitioner respectfully submits that the law precludes an appellate court from drawing a conclusion contrary to the jury so long as there is a reasonable factual basis in the record to support the jury's verdict. Once the jury has reached its verdict resolving disputed facts on which reasonable men may differ, the losing party is simply not free

to relitigate the factual dispute in a reviewing court. As was clearly pointed out by this Court in *Lavender v. Kurn*, 327 U.S. 645, 652, 653 (1945), a negligence case arising under the Federal Employers Liability Act:

> "Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury . . . ."

In reversing the verdict of the jury, the Court of Appeal summarized at length the purported investigation made by respondents and, thus, apparently believed that respondents performed the investigation they said they did. Petitioner submits, however, that the jury verdict in this case does have constitutional support because the Court of Appeal (1) failed to consider that the jury may have inferred that respondents attempted to confuse and mislead their readers and (2) failed to consider the substantial evidence demonstrating lack of credibility on the part of respondents which may have been justifiably relied on by the jury in totally disbelieving that respondents conducted any investigation. The decision of the Court of Appeal fails to even mention the evidence concerning respondents' credibility.

Petitioner respectfully submits that the jury could have justifiably inferred as follows based on evidence in the case:

1. Respondents did not do the investigating they claimed they did;

2. Respondents reviewed the San Diego telephone directory and the San Diego City Directory for names or telephone numbers of certain newspapers when they knew that those newspapers had not then been published in the years for which they conducted their search, all of which was done in order to make it appear that they conducted an investigation when in truth they did not;

3. Respondents intentionally confused their readers by intermixing names of various newspapers and taking names of various newspapers out of context in order to confuse and mislead their readers into believing that petitioner's claim was false; and

4. Respondents failed to investigate obvious available sources such as communicating with DR. WILL KRAMER or the owner of *Heritage*, HERB BRIN. In this regard, the jury could have found that defendants were put on notice by the KRAMER editorial that the *Heritage* claim was based on mergers and name changes and that they wilfully and intentionally did not investigate those sources because they did not want to know the truth.[1]

Petitioner urges that the issue of not only *what* investigative activities were undertaken by respondents, but *whether* they indeed did *any* investigating at all was an issue on which reasonable men may differ. The opinion of the Court of Appeal rests totally and completely on the assumption that respondents did what they said they did. But in holding that petitioner failed to prove constitutional actual malice, the Court invaded and usurped the historic and traditional function of the jury to determine the probative value of the evidence. Clearly, where two conflicting inferences may be drawn from the evidence, *i.e.*, whether respondents performed the investigative functions they said they did or whether they tried to confuse and mislead their readers into believing that they performed them when they did not, the jury is entitled to decide which one to believe.

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[1]*Curtis Publishing Co. v. Butts*, 388 U.S. 130, 161 (fn. 23) appears to rest at least in part on a finding that failure to further investigate after a notice or warning may satisfy the *New York Times* standard as well as on a finding of grossly inadequate and seriously deficient investigatory procedures. (*Id.* at pages 156-157).

In *Lavender v. Kurn, supra*, an action brought to recover damages for the wrongful death of a railway employee while in the performance of his duties, the evidence was capable of either of two inferences. The deceased had been struck on the back of his head causing a fractured skull from which he died. There were no eye witnesses to the fatal blow. Circumstantial evidence tended to show that he might have been struck by a train or that he might have been murdered. At trial, there was a jury verdict for the plaintiff. On appeal, the Supreme Court of Missouri reversed, holding that there was no substantial evidence of negligence to justify the submission of the case to the jury. This Court reversed the judgment of the Supreme Court of Missouri holding in effect that there was a question for the jury to determine, *i.e.*, which of the two inferences should be drawn from the evidence. The court stated at page 744:

> "It is no answer to say that the jury's verdict involves speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, the measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference."

By this decision, the Supreme Court apparently abandoned what had been an earlier doctrine, that if the evidence is capable of either of two inferences, it cannot be deemed to support either. The *Lavender* case apparently substituted the principle that in such an event, it is for the jury to determine which inference to deduce and that the jury has a right to draw either one. If is respectfully submitted that if the jury has a right to select one of two possible inferences that may be deduced from the evidence in negligence actions, it should have the right to do so in all cases, including libel.

In *Herbert v. Lando*, 441 U.S. 153, 161, this Court referred to the fact that reliance upon state of mind evidence is not a recent development arising from *New York Times* and similar cases. The Court also stated in that case (at page 165) that courts have traditionally admitted direct or indirect evidence relating to state of mind of the defendant as necessary under the circumstances of the case. Petitioner respectfully submits that the evaluation of state of mind evidence is a function of the jury and not of the reviewing court.

B. Substantial Confusion and Uncertainty for Future Defamation Plaintiffs Which Has Been Created by the Decision Below Will Be Reduced if Further Standards Are Announced as to Both the Type of Evidence Necessary to Support Proof of Constitutional Actual Malice and as to the Respective Functions of Jury and Reviewing Court.

Petitioner's research has not located any decision of this Court which discusses in depth what quantum of evidence will support proof of constitutional actual malice. Nor has petitioner located any decision of this Court which determines the respective functions of the jury and the reviewing court as concerns proof of constitutional actual malice.

In the watershed case of *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-286, this Court announced the rule that a public official could not recover damages for defamation unless he proved the falsehood was made with knowledge that it was false or with reckless disregard for truth or falsity.[2] The Court concluded, after applying the foregoing

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[2]Petitioner conceded the applicability of the *New York Times* doctrine at trial and in its brief to the Court of Appeal, because it sought and obtained punitive damages in reliance on *Gertz v. Robert Welch Inc.*, (1974) 418 U.S. 323.

standard, that the proof presented to show actual malice lacked the convincing clarity which the constitutional standard demands, and hence it would not constitutionally sustain the judgment for respondent under "the proper rule of law." The Court further noted that as to the individual petitioners, there was no evidence whatsoever "that they were aware of any erroneous statements or were in any way reckless in that regard." This Court further noted that the opinion of the *Times* secretary that he thought the advertisement was "substantially correct" was ". . . at least a reasonable one, and there was *no evidence to impeach the witness' good faith in holding it*." (Emphasis added).

In *Rosenbloom v. Metromedia*, 403 U.S. 29, 55, this Court stated that its independent analysis of the record in the case supported the conclusion of the Court of Appeals that none of the proofs considered singly or cumulatively satisfied the constitutional standard with the convincing clarity necessary to raise a jury question as to whether the defamatory falsehoods were broadcast with knowledge that they were false or with reckless disregard of whether they were false or not. The Court reviewed the evidence and then concluded that it agreed with the analysis of the Court of Appeals that the plaintiff's evidence failed to satisfy the *New York Times* standard:

> "We think that the episode described failed to provide evidence of actual malice with the requisite convincing clarity to create a jury issue under federal standards."

However, there is no reference in the *Rosenbloom* case to any substantial evidence affecting the defendants' credibility as was present in the instant case.

In *Beckley Newspapers Corp. v. Hanks* (1967) 389 U.S. 81, 83, this Court stated that it must review the entire record to assure the court that the judgment does not constitute a forbidden instrusion on the field of free expression. The

Court further examined the record and concluded that the proof presented there to show actual malice lacked the convincing clarity which the constitutional standard demanded. However, in that case, the jury was not properly instructed because the instructions were not based upon the *New York Times* rule and petitioner challenged the sufficiency of the evidence to support the judgment.

In *Time v. Pape*, 401 U.S. 279, 290, this Court noted that the *New York Times* rule was premised on a recognition that "some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press." However, this express recognition that some degree of journalistic abuse is inherent under our constitution, should not in any way sanction the abuse such as occurred in this case. This court has also recognized that errors of fact in reporting events may occur. However, suppose the factual errors are deliberate? Who has the final say as to whether the errors are deliberate, the jury or the reviewing court? In this case, petitioner submits that the jury verdict is reasonably supported by evidence which establishes that there were errors of fact and that the errors of fact were deliberate; yet, the Court of Appeals in effect said that the respondent is telling the truth, although the jury concluded to the opposite. The court in *Time v. Pape, supra*, at page 292, concluded that Time did not act in reckless disregard of the truth because the court felt that testimony of Time officials reflected at most an error of judgment. The jury may have justifiably believed that no such error of judgment was involved in the instant case.

However, none of the foregoing cases nor any other decision of this Court, to petitioner's knowledge, has focused on the precise issues raised herein. Petitioner respectfully submits that some further delineation of the type of evidence necessary to support proof of constitutional actual malice

with the convincing clarity necessary to create a jury issue under federal standards is necessary for the guidance of future defamation plaintiffs. Review of this case by the Court is also appropriate to determine whether petitioner's evidence may be deemed to be sufficient to support the jury's verdict under the *New York Times* doctrine.

II.

THIS COURT SHOULD DETERMINE WHAT STANDARD OF PROOF OF CONSTITUTIONAL ACTUAL MALICE APPLIES AT THE APPELLATE LEVEL.

Footnote 5 of the decision of the Court of Appeal, as modified, states as follows:

> "This standard of proof (clear and convincing evidence) to establish actual malice in the federal constitutional sense applies at the appellate level as well as at the trial level in that the appellate court must make a de novo review of the record below to satisfy itself that the trier of fact adhered to this standard. (See *New York Times Co. v. Sullivan, supra*, 376 U.S. 254, 282-286 [11 L.Ed.2d 686, 709-710]; *Beckley Newspapers Corp. v. Hanks* (1967) 389 U.S. 81, 82-83 [19 L.Ed.2d 248, 250-251])."

Petitioner submits that the *New York Times* doctrine and progeny do not hold and that this court should clarify and, if necessary, redefine the scope of appellate review regarding proof of constitutional actual malice. Petitioner respectfully submits that the scope of appellate review should be limited to determining whether there is any sufficient evidence from which the jury could logically infer that the defendant acted with knowledge of probable falsity or that he entertained serious doubts and that the statement in the modified opinion (footnote 5) of the Court of Appeal that the clear and convincing evidence standard applies at the appellate level, as well as at the trial level, is erroneous.

CONCLUSION.

The Court of Appeal has decided an important federal question in a way that greatly enhances the plaintiff's burden of proving constitutional actual malice. The opinion of the Court of Appeal creates a very dangerous precedent because it apparently allows a reviewing court to substitute its judgment for that of the jury merely because the defendant testifies that he made a pre-publication investigation. If the judgment is allowed to stand, its impact on the law of libel will be grave because it may foreshadow a substantial foreclosure of the action for defamation. The issues are momentous and urgently call for consideration by this Court.

This Court has recently stated that "it is not uncommon or improper . . . to suggest the abandonment, modification, or refinement of existing constitutional interpretation, and notable developments in First Amendment jurisprudence have evolved from just such submissions". See *Herbert v. Lando*, 441 U.S. 153, 169 (1979). In this regard, petitioner respectfully submits that some modification or refinement of the *New York Times* doctrine is in order to establish a rule of law that a reviewing court may not disturb a jury verdict when *New York Times* instructions have been given (which include instructions that the plaintiff must prove the *Times* standard by clear and convincing evidence) and the verdict of the jury is supported by some *substantial evidence* of awareness of probable falsity or reckless disregard for truth or falsity on the part of the defendant. More specific guidelines should be established so that a defamation plaintiff knows what will be considered to be convincing clarity for purposes of appellate review. Articulating such guidelines will be of benefit to the legal community and the public in general because it will further clarify and define what the burden of proof of a defamation plaintiff will be.

Notwithstanding any of the foregoing, petitioner respectfully requests the Court to review this case to determine if the jury's verdict does have constitutional support.

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ARNOLD G. REGARDIE,

Attorney for Petitioner.

Appendix

APPENDIX A.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Three.

Heritage Publishing Company, a California Corporation, Plaintiff and Respondent, v. Joseph J. Cummins, *et al.*, Defendants and Appellants. 2d Civ. No. 60302. (Super. Ct. No. C 104540).

Filed: October 6, 1981.

APPEAL from a judgment of the Superior Court of the County of Los Angeles. Jack T. Ryburn, Judge. Reversed.

Caidin, Kalman, Sampson & Marpet, Stanley Caidin and Newton Kalman for Defendants and Appellants.

Gordon, Weinberg & Gordon and Arnold G. Regardie for Plaintiff and Respondent.

Defendants, Joseph J. Cummins and B'nai B'rith Messenger, a California corporation (hereafter Messenger), appeal from a judgment upon a jury verdict, as reduced upon the conditional denial of a motion for new trial, of $25,000 in general damages and $50,000 in punitive damages in favor of plaintiff, Heritage Publishing Company (hereafter Heritage), in a libel action between the two Jewish weekly newspapers, both headquartered here in Los Angeles.[1]

We intend to reverse this judgment for failure to prove federal constitutional actual malice.[2]

---

[1]Defendant Cummins died subsequent to the filing of the notice of appeal herein and the executrix of his estate, Laurel Mae Cummins, has been substituted in his place as a defendant herein.

[2]We surmise that the 9 to 3 jury verdict here for Heritage was probably due in large part to the overwhelming proof of actual malice in the traditional sense on the part of defendant Cummins toward Heritage that Heritage offered. The jury was instructed upon both types of actual malice. On the record before us, defendant Cummins was an extremely abrasive competitor who tried repeatedly, before the 1974 article in the Messenger, which occasioned this lawsuit, to eliminate competition by Heritage through questionable tactics, to say the least. Furthermore, one of the headlines in the article itself was proved to be inaccurate.

FACTS

The Messenger contained a rather lengthy article in its July 19, 1974 issue, appearing under the by-line of its editor, defendant Cummins, and headlined "Will Kramer Attempts To Justify Heritage Claim — 'Published Since 1914' ", There Was No Southwestern Jewish Review Ever Published in San Diego", and "The Kramer Balderdash Can't Evade The Facts That The '1914' Claim Is False". It referred to an earlier article appearing in the Messenger of January 25, 1963, on the same subject, headlined "Southland History Should Not Be Perverted", in which was published a letter from Rabbi Trattner, who had been rabbi of Temple Beth Israel in San Diego during 1920 and 1921, stating that "there was no Southwestern Jewish Review nor did I ever hear of such a paper" and a statement of Rabbi Dubin, who continued the publication of the Temple Bulletin, which Rabbi Trattner had founded, that this was the only Jewish newspaper published in San Diego from 1921 to 1925 and that the Southwestern Jewish Press was not published in San Diego during that period of time. These were the two Jewish newspapers mentioned as predecessors of Heritage in Rabbi Kramer's article in Heritage which was reproduced in the 1974 article in the Messenger.

The 1974 article in the Messenger mentioned also a statement of another former rabbi of Temple Beth Israel, Rabbi Cohn, that a newspaper known as the Southwest Jewish Press had been founded only a few years before 1946. The article further stated that the telephone company in San Diego had advised the Messenger that the July 1940 listing of the Southwest Jewish Press was the first Jewish newspaper to be listed in any of its directories and that the city directory of San Diego did not contain a listing of a Jewish newspaper before 1941.

As already noted, the 1974 article mentioned the 1963 article on the same subject. This earlier article also stated that the American Jewish Year Books of 1912 through 1913 and 1916 through 1917 did not list any San Diego Jewish publication nor did the telephone and city directories of 1914. Finally, the 1974 article pointed out that a Mrs. Nathan F. Baranov, who had been a resident of San Diego for many years prior to 1914, had stated that when her late father, a prominent citizen of San Diego, died in 1916 his obituary was carried only in the San Diego Union and that, in her opinion, if any Jewish newspaper had then existed in San Diego, the obituary would have been published there. The article therefore called the listing in the Universal Jewish Encyclopedia of the Southwestern Jewish Review as a weekly founded in San Diego in 1914 "a slovenly error" and Heritage's claim that Heritage — Southwest Jewish Press — had been published since 1914 "a damnable lie."

The 1974 article, which defendant Cummins admittedly wrote, contained other hyperbole as well. It characterized Rabbi Kramer's article in Heritage as a "monumental hunk of hogwash," that "takes the cake for 'historical' unadulterated bunkum." It called Heritage's masthead statement "Published Since 1914" a damnable lie and accused Heritage of a "program of mendacity" in this respect.

Heritage was first published in February 1954. In August 1958 it acquired the Southwestern Jewish Press of San Diego from the Maxwell Kaufmans. This newspaper apparently started in February 1940 under the name of San Diego Jewish Press, but it had earlier been known as the Southwestern Jewish Review", which had been adjudicated a newspaper of general circulation in November 1934 and had

apparently originated in 1923.[3] The masthead of its April 1936 issue states that it incorporates "The Jewish Community News. Billings for all four Heritage publications apparently carried on their mastheads the words "Servin California Since 1914."

DISCUSSION

In the leading case of *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 279-280 [11 I .Ed.2d 686, 706], the United States Supreme Court enunciated the federal constitutional requirement (Amendments I, XIV) that a public official could not recover damages for a defamatory falsehood relating to his official conduct unless he proved that the falsehood was made with " 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." In *Garrison v. Louisiana* (1964) 379 U.S. 64, 74 [13 L.Ed.2d 125, 133], the same court a few months later interpreted the just-quoted language as meaning that civil liability in defamation attaches in such a situation only for "those false statements made with . . . [a] high degree of awareness of their probable falsity." A few years later in *St. Amant v. Thompson* (1968) 390 U.S. 727, 731 [20 L.Ed.2d 262, 267], the high court restated this constitutional requirement for liability for such defamation thusly: "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the publication" and also said that in such a situation "the finder of fact must determine whether the publication was indeed made in good faith." (*Id.* at p. 732 [267].)

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[3]The name of the Southwestern Jewish Review was not formally changed to Southwest Jewish Press until May 1959.

Although it would appear that plaintiff Heritage is at most a public figure (but obviously not a public official) (see *Curtis Publishing Co. v. Butts* (1967) 388 U.S. 130, 154-155 [18 L.Ed.2d 1094, 1111]),[4] and not a private individual (see *Gertz v. Welch* (1974) 418 U.S. 323, 325 [41 L.Ed.2d 789, 797], Heritage expressly conceded both in the trial court and in its brief to this court that the *New York Times'* constitutional requirement of actual malice applies herein and, of course, the jury was so instructed.

We have examined, as is our duty (see *Bindrim v. Mitchell* (1979) 92 Cal.App.3d 61, 72; *Montandon v. Triangle Publications* (1975) 45 Cal.App.3d 938, 948), the evidence in support of the jury's verdict for Heritage impliedly finding the falsity of the article of July 19, 1974 that defendant Cummins and the Messenger published, accusing Heritage of lying in claiming that it had been published since 1914, and have concluded that such evidence is neither clear nor convincing (see *Gertz v. Welch, supra,* 418 U.S. at p. 342 [41 L.Ed.2d at p. 807]; *Rollenhagen v. City of Orange* (1981) 116 Cal.App.3d 414, 421) in establishing that Cummins wrote the article either knowing that its basic accusation was untrue or in reckless disregard of whether it was true or false or with serious doubts regarding its truth.

As noted at the outset of this opinion, the article itself contained some internal evidence of some prior preparatory investigation by its author and publisher of the factual basis for the otherwise libelous accusation it made against Heritage. We refer to the statements of Rabbis Trattner, Dubin and Cohn mentioned in the article and its indication of some

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[4]Under *Curtis* a public figure may recover damages for a defamatory falsehood by showing "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." (388 U.S. at p. 155 [18 L.Ed.2d at p. 1111].)

investigation of the telephone and city directories of San Diego and of the American Jewish Year Books. Finally, the article mentioned the specific basis for Mrs. Baranov's conclusion that there was no Jewish newspaper in existence in San Diego in 1916. According to a letter that Rabbi Cohn wrote defendant Cummins about two weeks before the 1974 article was published, she had personally so advised him.

Gilbert Thompson, the associate editor and co-publisher of the Messenger at the time of the trial of this case, detailed in his testimony much of the factual investigation that was made in the preparation of the 1974 article in the Messenger. His testimony was based on notes that he and defendant Cummins made during the last week of June 1974. According to Thompson's testimony, defendant Cummins, in addition to obtaining the just-mentioned letter from Rabbi Cohn, personally went to the telephone company's library of old directories here in Los Angeles and was apparently advised by persons there that there were no listings for a Jewish Press for 1937, 1938, 1939 and 1940, but there were such listings in 1943 and 1944. He also ascertained that there was no such listings for 1914 and 1915. He also talked to the aforementioned Maxwell Kaufman, who had sold the Southwest Jewish Press to Heritage, to determine whether there was any mentioned of the Southwestern Jewish Review in the discussions that led to or accompanied this sale. Thompson himself, as Cummins' then assistant, searched at the Los Angeles public library the San Diego city directories for the years 1913 through 1923 and was unable to find in them any mention of any Jewish newspaper published in San Diego during those years. In fact, the first listings for any Jewish newspaper in San Diego appeared in 1924, 1925, 1926 and 1927 and were all for the Jewish Community News published at Temple Beth Israel. According to Thompson, a listing for the Jewish Press first appeared in

the 1940 San Diego City Directory and then again in the 1944 and 1945 publications of such directory.[5] Thompson also telephoned the San Diego Public Library, Temple Beth Israel (which had changed its name), the San Diego Union Tribune, the U.C.L.A. Library and the Huntington Library in San Marino, but was unable to locate any mention of the Jewish Community News, The Southwestern Jewish Review or the Southwest Jewish Press, among others. Finally, approximately two weeks before the 1974 article appeared in the Messenger, Thompson personally talked to Rabbi Dubin, who told him that so far as the rabbi knew there was no Jewish publication in San Diego prior to the Temple Beth Israel Bulletin, which he enlarged and named the Jewish Community News.

This prepublication investigation was, of course, not as thorough as it might have been. Neither defendant Cummins nor Thompson ever communicated with the three most obvious sources of the Heritage article the Messenger attacked, namely, the publisher of Heritage, Herbert Brin, the respected Jewish historian, the aforementioned Rabbi Kramer, who was the by-line author of the article, and the source given in the article itself of Heritage's claim to a 1914 origin, namely, the Universal Jewish Encyclopedia. Furthermore, as already noted, contrary to one of the headlines in the Messenger article, a Southwestern Jewish Review was published in San Diego, but not as early as 1914. Finally, neither defendant Cummins nor Thompson ever visited the Serra Museum of the San Diego Historical Society.

On the other hand, it cannot be said with any accuracy that defendants published their accusation of the falsity of

---

[5]Actually, the Jewish Community News was also listed in the San Diego City Directory for 1931.

the Heritage claim that it had been published since 1914 in reckless disregard of the truth or falsity of the accusation or with serious doubts of its truth. Defendant Cummins and his assistant, Thompson, had checked before publication with the two rabbis who were at Temple Beth Israel in San Diego from 1920 to 192 and according to both of them the Temple Bulletin was the only Jewish publication then published in San Diego. Furthermore, Cummins and Thompson, despite a rather thorough search of Southern California and San Diego libraries and directories (both telephone and city), were unable to find anything to substantiate Heritage's claim of a 1914 origin in San Diego.[6]

Accordingly, the reduced judgment for Heritage in this libel action must be reversed.

---

[6]The masthead statement of Heritage, that it has been published since 1914, is based upon a common and accepted newspaper practice of using the initial publication date of the oldest of the predecessor newspapers and the fact that these predecessor newspapers generally claimed this initial publication date either expressly or impliedly by volume number or claim of incorporation. Secondary sources, such as the American Jewish Year Book, the Universal Jewish Encyclopedia and the Jewish Press of the World, generally accepted this initial publication date with respect to these publications.

Actually, the oldest Jewish newspaper in San Diego, which was a predecessor of Heritage, was the Jewish Community News. This newspaper possibly started publication in 1918, but probably did so in 1920 when the aforementioned Rabbi Trattner became rabbi of Temple Beth Israel, which was then serving about 100 of the approximately 125 Jewish families then in San Diego. He started making the weekly Temple Bulletin into weekly Jewish newspaper. Rabbi Dubin succeeded him at the Temple in 1921. As already noted, Dubin enlarged the paper and named it the Jewish Community News.

The Temple Bulletin began as an annual in 1912 and 1913. In 1914 it apparently became more than an annual and in that same year one Sadie Epstein started a little mimeographed newspaper known as the San Diego Jewish Bulletin. This newspaper lasted until 1918 and served principally the Jewish servicemen who were in San Diego during World War I. No connection, however, between this publication and the Jewish Community News was ever established.

The foregoing history of the origin of Heritage perhaps explains Rabbi Dubin's testimony in his deposition, admitted at trial, to the effect that the Heritage claim of a 1914 origin was "absolutely untrue."

DISPOSITION

The judgment under appeal is reversed.

CERTIFIED FOR PUBLICATION

COBEY, Acting P.J.

We concur:

POTTER, J.

LUI, J.

APPENDIX B.

Order Modifying Opinion and Denying Petition for Rehearing.

In the Court of Appeal of the State of California, Second Appellate District, Division Three.

Heritage Publishing Company, a California Corporation, Plaintiff and Respondent, v. Joseph J. Cummins, *et al.*, Defendants and Appellants. 2d Civ. No. 60302. (Super. Ct. No. C. 104540).

Filed: November 4, 1981.

Our opinion heretofore filed herein on October 6, 1981, and appearing at 124 Cal.App.3d 305 in the Official Reports, is hereby modified by adding thereto a new footnote 5 to appear at the end of the first paragraph on page 310. This new footnote will read as follows:

> "[5]This standard of proof (clear and convincing evidence) to establish actual malice in the federal constitutional sense applies at the appellate level as well as at the trial level in that the appellate court must make a de novo review of the record below to satisfy itself that the trier of fact adhered to this standard. (See *New York Times Co. v. Sullivan, supra,* 376 U.S. 254, 282-286 [11 L.Ed.2d 686, 709-710]; *Beckley Newspapers Corp. v. Hanks* (1967) 389 U.S. 81, 82-83 [19 L.Ed.2d 248, 250-251.)"

Former footnote 5, appearing on page 311, is renumbered footnote 6.

Former footnote 6, appearing on page 312, is renumbered footnote 7.

Appellants' petition for rehearing is hereby denied.

APPENDIX C.

Order Denying Hearing.

Order Denying Hearing After Judgment by the Court of Appeal, 2nd District, Division 3, Civil No. 60302, in the Supreme Court of the State of California, in Bank.

Heritage Publishing Company, Cummins, as Executor, etc., et al.

Filed: December 30, 1981.

Respondent's petition for hearing DENIED.

BIRD

Chief Justice

APPENDIX D.

APPENDIX E.

HERITAGE - SOUTHWEST JEWISH PRESS

HERB BRIN, EDITOR & PUBLISHER

HERITAGE FOUNDED IN 1954

SOUTHWESTERN JEWISH PRESS ACQUIRED BY HERB BRIN — FROM MAXWELL KAUFMAN JULY 9, 1958 - NAME CHANGED TO SOUTHWEST JEWISH PRESS AUGUST, 1958

↑

SOUTHWESTERN JEWISH PRESS

(PUBLISHED EVERY THURSDAY AT SAN DIEGO SINCE 1914)

MAXWELL KAUFMAN, EDITOR AND PUBLISHER

PUBLISHED BY KAUFMAN SINCE - NOVEMBER, 1949 - A CONSOLIDATION OF S.D. JEWISH PRESS, S.W. JEWISH REVIEW AND THE JEWISH COMMUNITY NEWS

↑

SOUTHWESTERN JEWISH PRESS
SAN DIEGO JEWISH PRESS

PUBLISHED SINCE 1914 EVERY THURSDAY AT SAN DIEGO BY - LEWIS SOLOMON, EDITOR / RAY SOLOMON PUBLISHER

←

SOUTHWESTERN JEWISH REVIEW

"WITH WHICH IS INCORPORATED THE JEWISH COMMUNITY NEWS"

MORRIE KRAUS, EDITOR AND PUBLISHER

H.P. NERWICH, PUBLISHER } ESTAB. 1923

RABBI H. CERF STRAUS, EDITOR AND PUBLISHER

↑

JEWISH COMMUNITY NEWS

RABBI ERNEST TRATTNER, FOUNDER AROUND THE YEAR 1918

RABBI MAXWELL H. DUBIN, EDITOR

↑

TEMPLE BULLETIN
SAN DIEGO JEWISH BULLETIN

FOUNDED

1912 - 1914

APPENDIX A

Opposition

Office - Supreme Court, U.S.
FILED
APR 27 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1799
IN THE

Supreme Court of the United States

HERITAGE PUBLISHING COMPANY, a California corporation,
Petitioner,

vs.

JOSEPH J. CUMMINS, B'NAI B'RITH MESSENGER, a California corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI BRIEF FOR RESPONDENTS IN OPPOSITION.

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Questions Presented.

Petitioner has presented the questions in its petition to which respondents intend to respond.

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No. 81-1799

IN THE

Supreme Court of the United States

HERITAGE PUBLISHING COMPANY, a California corporation,
Petitioner,

vs.

JOSEPH J. CUMMINS, B'NAI B'RITH MESSENGER, a California corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI BRIEF FOR RESPONDENTS IN OPPOSITION.

Opinion Below.

The opinion of the California Court of Appeal appears at 124 Cal.App.3d 305 in the Official Reports.

Jurisdiction.

Respondents assert that there are no special and important reasons for the Court to grant a review of petitioner's petition for writ of certiorari. Respondents contend that the California Supreme Court:

(a) has not decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals,

(b) has not decided an important question of federal law which has not been, but should be, settled by this Court, and

(c) has not decided a federal question in a way in conflict with applicable decisions of this Court.

[*See*: Rule 17, Rules of the Supreme Court.]

Applicable Constitutional Provisions.

The applicable constitutional provisions are set forth at page 2 of the petition for writ of certiorari.

Statement of the Case.

Respondents are B'nai B'rith Messenger and Laurel Mae Cummins, Executrix of the Estate of Joseph J. Cummins, deceased. B'nai B'rith Messenger, a weekly newspaper in the City of Los Angeles, in an article published in its July 19, 1974 issue, challenged the claim of petitioner, Heritage Publishing Company, that petitioner's newspaper had been published since 1914.

Petitioner filed a complaint for libel in the Los Angeles Superior Court, and the California Court of Appeal reversed a jury verdict for libel, after its de novo review, on the ground that petitioner had failed to establish constitutional actual malice with the convincing clarity required by *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (hereinafter cited as "*New York Times*").

Thereafter, petitioner filed a petition for hearing in the California Supreme Court which was denied.

ARGUMENT.

Respondents oppose the granting of a review by the Supreme Court on petitioner's petition for writ of certiorari on the grounds that petitioner does not demonstrate the "character of reasons" that will be considered, as set forth in Rule 17 of the Rules of the Supreme Court.

The decision of the California Court of Appeal (set forth in the petition for writ of certiorari, Appendix A, pp. 1-9, and Appendix B, p. 10), shows that the California court intended to be bound by the federal constitutional requirement defined in *New York Times* and that petitioner could not recover damages unless it proved that the falsehood was made with actual malice, that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

The California Court of Appeal held that petitioner "is at most a public figure (but obviously not a public official)", relying on *Curtis Publishing Co. v. Butts*, 388 U.S. 130.

The California court further held that it was its duty to examine the evidence in support of the jury's verdict for petitioner and concluded that such evidence was neither clear nor convincing, relying on *Gertz v. Robert Welch Inc.* (1974) 418 U.S. 323, and *Rollenhagen v. City of Orange* (1981) 116 Cal.App.3d 414, 421.

In its order modifying the opinion and denying the petition for a rehearing, the California Court of Appeal added a footnote to its opinion, indicating that

> "[t]his standard of proof (clear and convincing evidence) to establish actual malice in the federal constitutional sense applies at the appellate level as well as at the trial level in that the appellate court must make a de novo review of the record below to satisfy itself that the trier of fact adhered to this standard. (See *New*

York Times Co. v. Sullivan, supra, 376 U.S. 254, 282-286 [11 L.Ed.2d 686, 709-710]; *Beckley Newspapers* Corp. v. Hanks (1967) 389 U.S. 81, 82-83 [19 L.Ed.2d 248, 250-251.]"

Petitioner has not attempted to show that either the California Court of Appeal or the California Supreme Court has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals, or that the California Court of Appeal and California Supreme Court have decided a federal question in a way in conflict with applicable decisions of this Court.

The principal ground asserted by petitioner is that the California court has decided an important question of federal law which has not been, but which should be, settled by this Court. Respondent contends, on the contrary, that the questions presented for review by the petition for writ of certiorari have, in fact, been settled by this Court in a long line of decisions, beginning with *New York Times*.

I.

The Decision of the California Court of Appeal Is Clearly Correct.

The Supreme Court in *New York Times* held that "actual malice" must be provided with "convincing clarity". Under *New York Times*, it is the duty of the reviewing court to reconsider the facts elicited below to assure that constitutional principles have properly been applied. Justice Brennan referred to it as "de novo review", citing *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 54 (1971).

In public figure and public official cases, a reviewing court is required to determine for itself that the jury verdict below is based upon a proper finding of publication with knowledge of falsity or subjective awareness of probable falsity proved with "convincing clarity" by competent ev-

idence. *New York Times, supra; Times, Inc. v. Pape*, 401 U.S. 279 (1971).

On its own review, the California Court of Appeal concluded that

> ". . . it cannot be said with any accuracy that defendants published their accusation of the falsity of the Heritage claim that it had been published since 1914 in reckless disregard of the truth or falsity of the accusation or with serious doubts of its truth." [Petition for Writ of Certiorari, App. A, pp. 7-8.]

In its review of the evidence, the Court of Appeal found that

> ". . . the article itself contained some internal evidence of some prior preparatory investigation by its author and publisher of the factual basis for the otherwise libelous accusation it made against Heritage. We refer to the statements of Rabbis Trattner, Dubin and Cohn mentioned in the article and its indication of some investigation of the telephone and city directories of San Diego and of the American Jewish Year Books. Finally, the article mentioned the specific basis for Mrs. Baranov's conclusion that there was no Jewish newspaper in existence in San Diego in 1916. According to a letter that Rabbi Cohn wrote defendant Cummins about two weeks before the 1974 article was published, she had personally so advised him.
>
> Gilbert Thompson, the associate editor and co-publisher of the Messenger at the time of the trial of this case, detailed in his testimony much of the factual investigation that was made in the preparation of the 1974 article in the Messenger. His testimony was based on notes that he and defendant Cummins made during the last week of June 1974. According to Thompson's testimony, defendant Cummins, in addition to obtaining the just-mentioned letter from Rabbi Cohn, per-

sonally went to the telephone company's library of old directories here in Los Angeles and was apparently advised by persons there that there were no listings for a Jewish Press for 1937, 1938, 1939 and 1940, but there were such listings in 1943 and 1944. He also ascertained that there was no such listings for 1914 and 1915. He also talked to the aforementioned Maxwell Kaufman, who had sold the Southwest Jewish Press to Heritage, to determine whether there was any mentioned of the Southwestern Jewish Review in the discussions that led to or accompanied this sale. Thompson himself, as Cummins' then assistant, searched at the Los Angeles public library the San Diego city directories for the years 1913 through 1923 and was unable to find in them any mention of any Jewish newspaper published in San Diego during those years. In fact, the first listings for any Jewish newspaper in San Diego appeared in 1924, 1925, 1926 and 1927 and were all for the Jewish Community News published at Temple Beth Israel. According to Thompson, a listing for the Jewish Press first appeared in the 1940 San Diego City Directory and then again in the 1944 and 1945 publications of such directory.[5] Thompson also telephoned the San Diego Public Library, Temple Beth Israel (which had changed its name), the San Diego Union Tribune, the U.C.L.A. Library and the Huntington Library in San Marino, but was unable to locate any mention of the Jewish Community News, The Southwestern Jewish Review or the Southwest Jewish Press, among others. Finally, approximately two weeks before the 1974 article appeared in the Messenger, Thompson personally talked to Rabbi Dubin, who told him that so far as the rabbi knew there was no Jewish publication in San Diego prior to the Temple Beth Israel Bulletin, which he enlarged and named the Jewish Community News.

. . . .

". . . Defendant Cummins and his assistant, Thompson, had checked before publication with the two rabbis who were at Temple Beth Israel in San Diego from 1920 to 192[sic] and according to both of them the Temple Bulletin was the only Jewish publication then published in San Diego. Furthermore, Cummins and Thompson, despite a rather thorough search of Southern California and San Diego libraries and directories (both telephone and city), were unable to find anything to substantiate Heritage's claim of a 1914 origin in San Diego."

[Petition for Writ of Certiorari, App. A., pp. 5-8.]

The de novo review by the California Court of Appeal in the instant case typically parallels the de novo review defined in *New York Times* and undertaken by appellate courts in the cases following *New York Times*. Thus, see, for example, the review conducted by Judge Rives in *Bon Air v. Time, Inc.*, 426 F.2d 858 (1970), wherein Judge Rives, after reviewing the investigative activities of Time, Inc. and Jenkins, found that Bon Air had presented no evidence that either Time, Inc. or Jenkins had published the alleged libelous statements with knowledge of their falsity or with serious doubts as to the truth of the publication.

Although petitioner contends in its petition that it "was improper for the Court of Appeal to conclude respondents had conducted a reasonable investigation when the record reflected a sufficient basis for the jury to conclude that they did not and that they entertained serious doubts as to the truth of their claim", the doctrine of appellate review in defamation cases established in *New York Times* required the California court to determine for itself that the jury verdict below was based upon a proper finding of publication with knowledge of falsity or subjective awareness of prob-

able falsity proved with "convincing clarity" by competent evidence.

Petitioner's conclusion that the California Court of Appeal acted improperly in reaching its decision is based upon its attempt to persuade this Court that the guidelines established by *New York Times* are not applicable to this case.

It is unseemly for petitioner to contend that the guidelines established by *New York Times* are inapplicable to this case, however, because of concessions made by petitioner at every stage of the trial and appellate proceedings. Thus, the California Court of Appeal found:

> "Heritage expressly conceded both in the trial court and in its brief to this court that the *New York Times'* constitutional requirement of actual malice applies herein and, of course, the jury was so instructed." [Opinion of the California Court of Appeal, Appendix A to Petition for Writ of Certiorari, page 5.]

The remaining questions presented for review by petitioner are merely variations of petitioner's contention that it was improper for the California Court of Appeal to exercise a de novo review and to determine for itself whether the jury verdict below was based upon a proper finding of publication with knowledge of falsity or subjective awareness of probable falsity proved with "convincing clarity" by competent evidence.

For brevity, petitioner's remaining questions may be telescoped and paraphrased as follows: Does the doctrine of de novo review establish in *New York Times* apply in the instant case, and, if it does apply, must a plaintiff in a defamation proceeding always prove with "convincing clarity" that the defendant published a falsehood knowing it was false or with a high disregard of awareness of its probable falsity? Petitioner contends in effect that, on appeal, the appellate court ought to be bound by the determination made by the

jury and that, if the jury determination is not binding, defendants in defamation proceedings are immunized from liability whenever a defamation defendant testifies that he made some investigation of the libelous material before publication.

As previously stated, respondents contend that petitioner has already conceded that the appellate de novo review established by *New York Times* applies in the instant case. As to the suggestion made by petitioner that a defendant is immunized from liability where he testifies that he made some investigation of the libelous material before publishing, mere statements by a defendant of his belief in the truth of a publication ". . . will carry the day only if they are not overridden by evidence establishing knowing or 'reckless' falsity." Robert D. Sack, *Libel, Slander and Related Problems*, p. 214; *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968); *Reliance Ins. Co. v. Barron's*, 442 F.Supp. 1341, 1350 [3 Med. L. Rep. 1033] (S.D.N.Y. 1977).

Respondents further contend that, not only has petitioner conceded that the *New York Times* standard is applicable in the instant case, but that constitutional protection for freedom of the press is consistent with a rule which makes the press actionable in damages for defamation only when it publishes in violation of the *New York Times* standard.

Finally, truth is a defense, and the California Court, in footnote 6 of its Opinion, at page 8, explicitly acknowledges the viability of respondents' contention that petitioner's claim that its newspaper, Heritage, had been published since 1914 was false. Thus, Justice Cobey stated at the conclusion of footnote 6:

> "The foregoing history of the origin of Heritage perhaps explains Rabbi Dubin's testimony in his deposition, admitted at trial, to the effect that the Heritage claim of a 1914 origin was 'absolutely untrue'."

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Dated: April 23, 1982.

Respectfully submitted,

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